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No. 99-62

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In the Supreme Court of the United States

SANTA FE INDEPENDENT SCHOOL DISTRICT,
Petitioner,

v.

JANE DOE, *ET AL.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF ON THE MERITS OF *AMICI CURIAE* STATE OF TEXAS, ATTORNEY GENERAL OF TEXAS JOHN CORNYN, GOVERNOR OF TEXAS GEORGE W. BUSH, STATES OF ALABAMA, KANSAS, LOUISIANA, MISSISSIPPI, NEBRASKA, SOUTH CAROLINA, AND TENNESSEE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether Petitioner's policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause.

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Index of Authorities iv

Interest of *Amici* 2

Summary of the Argument 3

Argument 5

I. A Student-Led, Student-Initiated Religious Message Cannot "Establish" Religion Because There Is No Impermissible State Action. 5

A. School Officials Do Not Initiate or Direct the Content of Student Messages Under Santa Fe's Policy 5

B. The Fifth Circuit Incorrectly Assumed that Students Are Transformed into State Actors when Speaking at School Events 10

II. The Santa Fe Football Policy Furthers Government Neutrality Towards Religion. 18

A. The Policy Is Facially Neutral 18

B. The Policy Has Valid Secular Purposes .. 19

III. The Court Should Address the Fifth Circuit's Prohibition on All but Nonsectarian, Nonproselytizing Student Speech 22

Conclusion 25

INDEX OF AUTHORITIES

CASES

Adler v. Duval County Sch. Bd., 174 F.3d 1236 (1999), *reh'g en banc granted and opinion vacated*, 1999 WL 354889 (CA11 June 3, 1999) 10, 20

Americans United for Separation of Church & State v. City of Grand Rapids, 980 F.2d 1538 (CA6 1992) .. 21

Blum v. Yaretsky, 457 U.S. 991, 102 S.Ct. 2777 (1982) 7, 8

Board of Educ. v. Mergens, 496 U.S. 226, 110 S.Ct. 2356 (1990) 6, 14, 15, 21

Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 115 S.Ct. 2440 (1995) ..... *passim*

Chandler v. James, 180 F.3d 1254 (CA11 1999), *petition for cert. filed*, 68 U.S.L.W. 3391 (U.S. Dec. 2, 1999) (No. 99-935) 6, 10, 20

Chandler v. James, 985 F.Supp. 1062 (M.D. Ala. 1997), *aff'd in part and vacated in part*, 180 F.3d 1254 (CA11 1999) 16

Cohen v. California, 403 U.S. 15, 91 S.Ct. 1780 (1971) 14

Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 93 S.Ct. 2955 (1973) 21

Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 105 S.Ct. 3439 (1985) 23

Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 107 S.Ct. 2862 (1987) 21

Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806 (CA5 1999), *cert. granted*, 120 S.Ct. 494 (1999) (No. 99-62) ..... *passim*

Edmonson v. Leesville Concrete Co., 500 U.S. 614, 111 S.Ct. 2077(1991) 8

Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261 (1962) ... 18

Evans v. Newton, 382 U.S. 296, 86 S.Ct. 486 (1966) ... 10

Everson v. Board of Educ., 330 U.S. 1, 67 S.Ct. 504 (1947) 5, 18

Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 98 S.Ct. 1729, 1733 (1978) 7

Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 101 S.Ct. 2559 (1981) 23

Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (CA5 1992) 20, 22-24

Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 113 S.Ct. 2141 (1993) 23

Lee v. Weisman, 505 U.S. 577, 112 S.Ct. 2649 (1992) 7-8

Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105 (1971) 18, 20-21

Lugar v. Edmondson Oil Co., 457 U.S. 922, 102 S.Ct. 2744, 2753 (1982) 6, 7

Lynch v. Donnelly, 465 U.S. 668, 104 S.Ct. 1355 (1984) 13

Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 115 S.Ct. 2510 (1995) 9, 18

San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 107 S.Ct. 2971, 2986 (1987) 6-7, 8

School Dist. of Abington Township v. Schempp, 374 U.S. 203, 83 S.Ct. 1560 (1963) 18

Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 89 S.Ct. 733 (1969) 14

Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290, 105 S.Ct. 1953 (1985) 15

United States v. Salerno, 481 U.S. 739, 107 S.Ct. 2095 (1987) 15

Wallace v. Jaffree, 472 U.S. 38, 105 S.Ct. 2479 (1985) 20

Walz v. Tax Comm'n, 397 U.S. 664, 90 S.Ct. 1409 (1970) 5, 6

Widmar v. Vincent, 454 U.S. 263, 102 S.Ct. 269 (1981) 23-24

Zorach v. Clauson, 343 U.S. 306, 72 S.Ct. 679 (1952) 18, 21

CONSTITUTIONAL PROVISIONS AND RULES

U.S. CONST. amend. I ..... *passim*

U.S. CONST. amend. XIV 5

SUP. CT. R. 37.6 2

SUP. CT. R. 37.2(a) 3

OTHER AUTHORITIES

WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1983) 9

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BRIEF ON THE MERITS OF *AMICI CURIAE* STATE OF TEXAS, ATTORNEY GENERAL OF TEXAS JOHN CORNYN, GOVERNOR OF TEXAS GEORGE W. BUSH, STATES OF ALABAMA, KANSAS, LOUISIANA, MISSISSIPPI, NEBRASKA, SOUTH CAROLINA, AND TENNESSEE IN SUPPORT OF PETITIONER

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

This case presents the question of whether a public school district's policy that permits, but does not require, student-led, student-initiated prayer at football games violates the Establishment Clause. For the reasons that follow, *amici* believe that this facially neutral policy is constitutional, and urge the Court to reverse the Fifth Circuit's judgment to the contrary.

INTEREST OF *AMICI*

The State of Texas, Texas Attorney General John Cornyn, Texas Governor George W. Bush, and the States of Alabama, Kansas, Louisiana, Mississippi, Nebraska, South Carolina and Tennessee appear as *amici curiae* and urge the Court to reverse the judgment of the Fifth Circuit.[1] *Amici* have an interest in this case because the Fifth Circuit's decision will impose liability on states and other governmental entities for Establishment Clause violations despite the lack of any impermissible state action. The court of appeals implicitly found that students who engage in religious speech at school-sponsored events—without official sanction or oversight—become state actors who can violate the Establishment Clause with their remarks. Under this novel and unprecedented standard, whenever the state opens a forum for speech, whether by students or others, it will be in danger of attracting lawsuits based on the speech of private individuals. The Fifth Circuit's decision will have far-reaching implications on religious and other speech beyond the context of high school football games. Because officials cannot constitutionally censor student remarks to excise religious content, they will be forced to limit or close entirely existing forums for student speech. Ultimately, this could negatively impact other forums for public speech outside the school context, to the detriment of public discourse in America.

1. As required by SUP. CT. R. 37.6, *amici* state that this brief was not authored in whole or in part by any party to this action, and no person or entity made a monetary contribution for the preparation or submission of this brief.

The parties have given their consent to the filing of this brief, as shown in the blanket letter of consent filed by the parties with this Court on December 22, 1999. *See* SUP. CT. R. 37.2(a).

SUMMARY OF THE ARGUMENT

In two short, dismissive paragraphs, the Fifth Circuit held that Santa Fe Independent School District's student message policy for school football games violated the Establishment Clause of the First Amendment. *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 823 (CA5 1999), *cert. granted*, 120 S.Ct. 494 (1999) (No. 99-62) (hereinafter "*Santa Fe I.S.D.*"). The court failed to explain why the football policy was unconstitutional, except to derisively state that football is "hardly the sober type of annual event that can be appropriately solemnized with prayer." *Id.* The Fifth Circuit opined that a school prayer policy could not survive outside the "nurturing context" of a graduation ceremony, and therefore the school district's football policy could not withstand scrutiny, regardless of whether the court imposed the nonsectarian, nonproselytizing content requirements it had imposed on the district's graduation policy.[2] *Id.*

Most tellingly, however, the court failed to identify any state action that would violate the First Amendment's proscription against establishing a religion. Although the Santa Fe policy is facially neutral and allows students—not school officials—"to deliver a brief invocation and/or

2. Because the Court did not grant the writ to address the graduation policy, this brief will address it only in so far as the Fifth Circuit's reasoning illuminates its rather abbreviated discussion of the football policy.

message" without official sanction or oversight, the court glossed over the fundamental requirement of state action in finding an Establishment Clause violation.

The Fifth Circuit's blanket prohibition on student-led, student-initiated religious speech at school football games, and indeed at any event outside the graduation context, would force school officials to engage in unconstitutional viewpoint discrimination by censoring only religious speech. This violates the Court's repeated admonitions that, above all, the state must be neutral towards religion. The Fifth Circuit's judgment must be reversed.

The Court should also address the Fifth Circuit's requirement that any student religious speech must be nonsectarian and nonproselytizing. The Fifth Circuit assumed that this content-based requirement would apply to the football policy, and it will still stand if the Court reverses the judgment below. The Court has never limited constitutional protection to only nonsectarian and nonproselytizing religious speech, and to do so will result in viewpoint discrimination in violation of the First Amendment.

ARGUMENT

I. A STUDENT-LED, STUDENT-INITIATED RELIGIOUS MESSAGE CANNOT "ESTABLISH" RELIGION BECAUSE THERE IS NO IMPERMISSIBLE STATE ACTION.

A. School Officials Do Not Initiate or Direct the Content of Student Messages Under Santa Fe's Policy.

By definition, state action is the determining factor in evaluating a possible Establishment Clause violation.[3] Before a violation can be found, then, impermissible state action must exist. Because students, not school officials, initiate and deliver any message under Santa Fe's student-message policy, there can be no impermissible state action, and thus no Establishment Clause violation.

The First Amendment states that "Congress shall make no law respecting an establishment of religion," U.S. CONST. amend. I, and the Court has applied the Establishment Clause to the states through the Fourteenth Amendment Due Process Clause. *Everson v. Board of Educ.*, 330 U.S. 1, 14-15, 67 S.Ct. 504, 511 (1947). "The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally

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3. "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another." *Everson v. Board of Educ.*, 330 U.S. 1, 15, 67 S.Ct. 504, 511 (1947). "[F]or the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Comm'n*, 397 U.S. 664, 668, 90 S.Ct. 1409, 1411 (1970).

established religion or governmental interference with religion." *Walz v. Tax Comm'n*, 397 U.S. 664, 669, 90 S.Ct. 1409, 1411-12 (1970). The Court has recognized "a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Educ. v. Mergens*, 496 U.S. 226, 250, 110 S.Ct. 2356, 2372 (1990) (plurality). Private individuals who are not acting as surrogates of the state are not state actors, and thus cannot violate the Establishment Clause. *See Chandler v. James*, 180 F.3d 1254, 1261 (CA11 1999), *petition for cert. filed*, 68 U.S.L.W. 3391 (U.S. Dec. 2, 1999) (No. 99-935); *see also San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 546, 107 S.Ct. 2971, 2986 (1987) (citations omitted); *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 767, 115 S.Ct. 2440, 2449 (1995) (plurality).

The Court has consistently recognized that a government "normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]."[4] *San Francisco Arts & Athletics, Inc.*, 483

4. Outside the First Amendment context, the Court has applied a two-part test to determine whether the deprivation of a federal right is "fairly attributable" to the state. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 2753 (1982). "First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Id.* "Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.* at 937, 102 S.Ct. at 2754. Focusing on the state actor prong, as discussed *infra*, it is clear that student speakers are not state actors

U.S. at 545, 107 S.Ct. at 2986; *Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S.Ct. 2777, 2786 (1982). That cannot be said of the Santa Fe policy, which allows only student-led, student-initiated speech, without official coercion or encouragement. Mere acquiescence in the actions of private individuals is not sufficient to create state action. *Blum*, 457 U.S. at 1004-05, 102 S.Ct. at 2785-86.

The Court's state-action requirement recognizes that "most rights secured by the Constitution are protected only against infringement by governments." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936, 102 S.Ct. 2744, 2753 (1982) (quoting *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156, 98 S.Ct. 1729, 1733 (1978)). "Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Id.*

The Court recognized the necessity of state action in *Lee v. Weisman*, when it held that the Constitution was violated because the religious speech was controlled and directed by the school: a *school official* determined that a prayer should be given, a *school official* chose the religious speaker, a *school official* asked that speaker to provide a prayer, and a *school official* directed and controlled the content of that prayer. 505 U.S. 577, 586-87, 112 S.Ct. 2649, 2655-56 (1992).

under Santa Fe's facially neutral policy.

The holding in *Lee* is surprisingly simple: the Constitution is violated when "[s]tate officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools." *Id.* at 586, 112 S.Ct. at 2655.

Applying this precedent, it is clear that there is no state action here. The relevant actors are student speakers with no actual or apparent state authority. No school official directs the performance of any formal religious exercise. There is no official sanction for the speech, nor is there any endorsement. School officials have not "exercised coercive power or . . . provided such significant encouragement, either overt or covert," that student speech prior to football games must be deemed to be that of the school district. *See Blum*, 457 U.S. at 1004, 102 S.Ct. at 2786. There is no "joint participation" by school officials in the student speech. *See Lugar*, 457 U.S. at 941, 102 S.Ct. at 2756 (holding that private party's joint participation with state officials in seizure of property was state action for purposes of Fourteenth Amendment). Nor are students, by giving a message prior to football games, performing a function that has been "traditionally the exclusive prerogative" of the school district. *See San Francisco Arts & Athletics, Inc.*, 483 U.S. at 544, 107 S.Ct. at 2985 (holding that U.S. Olympic Committee was not a state actor). At most, the school district tolerates and permits student-led and student-initiated speech.[5]

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5. This is not at all like the peremptory challenges exercised by private parties addressed in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620-25, 111 S.Ct. 2077, 2083-85 (1991), where a party's discriminatory strike of a prospective juror was not possible without "the overt, significant participation of the government," *id.* at 622, 111 S.Ct. at 2084. With peremptory challenges, the judge exercises substantial control over *voir dire*, oversees the exclusion of jurors, and advises a juror that he has been stricken. *Id.* at 623, 111 S.Ct. at 2084. Here, a student takes up a microphone only after an explicitly student-initiated election process and chooses his own words without official coercion, supervision, or control.

The students here cannot fairly be said to be state actors and impermissible state action is entirely missing from this case. The fact that student prayer may occur at a school-sponsored event does not immediately render the speech unconstitutional.[6] As long as the speech is private and not attributable to the state, there is no state action that violates the Establishment Clause. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 841, 115 S.Ct. 2510, 2522-23 (1995).

As a fundamental proposition, Santa Fe's football policy does not violate the First Amendment because it implicates no improper state action. Yet the Fifth Circuit found a violation of the Establishment Clause. Necessarily, then, the court reached the novel conclusion that students are transformed into state actors when they speak at school events.

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6. Indeed, the policy does not even require a prayer at all, but allows students to determine what message or invocation, if any, to deliver. The term "message" is unquestionably neutral, and the dictionary definition of "invocation" does not require an interpretation grounded in religion. *See* 168 F.3d at 831 (Jolly, J., dissenting); WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 637 (1983) (defining "invocation" to include "the act or process of petitioning for help or support . . . a calling upon for authority or justification . . . a formula for conjuring: INCANTATION . . . [and] and act of legal or moral implementation: ENFORCEMENT."

B. The Fifth Circuit Incorrectly Assumed that Students Are Transformed into State Actors when Speaking at School Events.

Although the Fifth Circuit did not directly address state action in its short discussion of the football policy, it stated earlier—without any explanation—that student-led graduation prayers "do not constitute private speech."[7] 168 F.3d at 821-22, n.12.

The remarkable conclusion that students are somehow transformed into state actors when speaking at school-sponsored events conflicts with the recent Eleventh Circuit case of *Chandler v. James*, 180 F.3d 1254 (CA11 1999), *petition for cert. filed*, 68 U.S.L.W. 3391 (U.S. Dec. 2, 1999) (No. 99-935).[8] The *Chandler* court correctly noted that to satisfy the scrutiny of the First Amendment, school officials must remain neutral and play no role in the student's speech—the fact that the speech is permitted, standing alone, does not run afoul of the First Amendment. Unless the school is using the student as a "surrogate" or is commanding the speech, there is no state action. "Religious speech by students does not become forbidden 'state action' the moment the students walk through the schoolhouse door." *Id.* at 1261-62.

7. Although the Fifth Circuit did not explain its novel reasoning, the Eleventh Circuit attempted to do so in a now-vacated opinion that addressed a similar student-message policy. *See Adler v. Duval County Sch. Bd.*, 174 F.3d 1236, 1246-47 (1999), *reh'g en banc granted and opinion vacated*, 1999 WL 354889 (CA11 June 3, 1999). In *Adler*, the court found that students elected to give a brief "message" at graduation ceremonies were state actors because the school had "delegated" a portion of the graduation ceremony to them. *Id.* The court improperly relied on *Evans v. Newton*, 382 U.S. 296, 299, 86 S.Ct. 486, 488 (1966), for the proposition that when a state delegates governmental functions to private individuals, those individuals must be subject to constitutional limits. *Evans* dealt with a city that became a trustee of a park under a will providing that it be used for white people only. *Id.* at 297, 86 S.Ct. at 487. Private individuals were later appointed as trustees. Delegating governmental functions to private individuals cannot be equated with providing a neutral, student-message policy, however, and *Evans* is inapposite. And, as discussed *infra*, there is no other delegation of state functions to student speakers under Santa Fe's football policy.

As the *Chandler* court recognized, the lack of a state actor wholly defeats a First Amendment claim. *See id.* at 1261-62, 1265. How can an individual student's choice of topics and words, selected without any official oversight, be attributable to the state? If that is so, then virtually any words uttered at a school podium or microphone—whether by students or non-students—will be attributable to the school and subject it to unforeseen liability. A person does not become a state actor simply because he ascends a school podium.

The Court considered whether an Establishment Clause violation could exist in the absence of government action in *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 115 S.Ct. 2440 (1995). Petitioners opposed the erection of a Ku Klux Klan cross on a state-owned plaza, and argued that the state could constitutionally apply a content-based restriction on private expression because an observer might mistake the expression for officially endorsed religious expression. *Id.* at 763, 115 S.Ct. at 2447. Although a majority of the Court held that the state's denial of the Klan's

8. The Eleventh Circuit rendered the *Chandler* decision shortly after it vacated *Adler* and took it *en banc*.

application for a permit to display the cross violated the First Amendment, they disagreed over whether a bystander's perception that private speech was actually public was enough to constitute an Establishment Clause violation. Justices Scalia, Kennedy, Thomas, and Chief Justice Rehnquist rejected the idea that the government could "endorse" private religious speech when it had not fostered or encouraged the speech, simply because an uninformed observer mistook it for government speech. *Id.* at 763-70, 115 S.Ct. at 2447-2450. The plurality found that a test that "would attribute to a neutrally behaving government private religious expression, has no antecedent in our jurisprudence, and would better be called a 'transferred endorsement' test." *Id.* at 764, 115 S.Ct. at 2447-48. "By its terms [the Establishment] Clause applies only to words and acts of government. It was never meant, and has never been read by this Court, to serve as an impediment to purely private religious speech connected to the State only through its occurrence in a public forum." *Id.* at 767, 115 S.Ct. at 2449.

Justice O'Connor, joined by Justices Souter and Breyer, concurred in the judgment, but advocated using an "endorsement test" that would apply "even where a neutral state policy toward private religious speech in a public forum is at issue." *Id.* at 772, 115 S.Ct. at 2451 (O'Connor, J., concurring). In their view, the test would take into account the objective "perception of a reasonable, informed observer," much like the "reasonable person" in tort law. *Id.* at 773, 779, 115 S.Ct. at 2452, 2455. They would find an Establishment Clause violation "[w]here the government's operation of a public forum has the *effect* of endorsing religion, even if the governmental actor neither intends nor actively encourages

that result." *Id.* at 777, 115 S.Ct. at 2454 (citing *Lynch v. Donnelly*, 465 U.S. 668, 690, 104 S.Ct. 1355, 1368 (1984) (O'Connor, J., concurring)) (emphasis added).

Despite the Court's disagreement over the proper analysis, it agreed that state action was necessary for an Establishment Clause violation. *Id.*; *see also id.* at 799, 115 S.Ct. at 2465-66 (Stevens, J., dissenting) (Establishment Clause "prohibits government from appearing to take a position on questions of religious belief") (internal quotations and citation omitted); *id.* at 817, 115 S.Ct. at 2475 (Ginsburg, J., dissenting) ("a State may not permit . . . a display of this character"). Justice O'Connor disagreed that her view mistakenly attributed private speech to the state, and argued that the Establishment Clause violation would occur "because the State's own actions (operating the forum in a particular manner and permitting the religious expression to take place therein), and their relationship to the private speech at issue, actually convey a message of endorsement." .*Id.* at 777, 115 S.Ct. at 2454. Thus, "a private religious group may so dominate a public forum that a formal policy of equal access is transformed into a demonstration of approval." *Id.* (citation omitted).

That is not the case with Santa Fe I.S.D.'s policy, which allows individual students to give a message or invocation prior to school football games. There is no sponsorship or control of the speech, and thus no endorsement of its content. In the absence of some official endorsement or control on the part of the school, even Justice O'Connor's reasonable, informed observer standard is not violated. "[S]econdary school students are mature enough and are likely to understand that a school does not endorse or support student

speech that it merely permits on a nondiscriminatory basis. The proposition that schools do not endorse everything they fail to censor is not complicated." *Board of Educ. v. Mergens*, 496 U.S. 226, 250, 110 S.Ct. 2356, 2372 (1990) (citations omitted). Indeed, by providing that student speakers will be selected by their peers, the football policy underscores that students, not school officials, initiate and control the process.[9] This facial challenge to the policy simply cannot establish that there is no set of circumstances under which this policy would

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9. The fact that the student speaker may express the majority viewpoint does not run afoul of the Constitution. The First Amendment focuses on the rights of the speaker, not of the listener.

> [T]he mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense. . . . [W]e have . . . consistently stressed that "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech." The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

Cohen v. California, 403 U.S. 15, 21, 91 S.Ct. 1780, 1786 (1971) (citations omitted). If the speaker chooses to voice an opinion that happens to be aligned with the views of the majority, that does not make the speaker's right to speak any less legitimate. Constitutionally speaking, the majority view is just as valid as the minority view. Any broader view "would effectively empower" the minority "to silence dissidents simply as a matter of personal predilections." Even in the school context, a regulation prohibiting certain viewpoints would violate the constitutional rights of students, at least where there is no showing of material and substantial disruption of school work and discipline. *See Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 513, 89 S.Ct. 733, 740 (1969).

be valid.[10]

Nor does the mere presence of school officials at school football games somehow make student prayer impermissible, as the Fifth Circuit insinuated. *Santa Fe I.S.D.*, 168 F.3d at 823. The Fifth Circuit remarked that "[r]egardless of whether the prayers are selected by vote or spontaneously initiated at these frequently-recurring, informal, school-sponsored events, school officials are present and have the authority to stop the prayers." *Id.* There is no constitutional violation when school officials are present but do not participate in student-initiated religious speech. Similarly, the Establishment Clause is not implicated in the policy's provision allowing the "advice and direction" of the high school principal in the administration of the student-initiated election. "[C]ustodial oversight of the student-initiated religious [activities], merely to ensure order and good behavior, does not impermissibly entangle government in the day-to-day surveillance or administration of religious activities." *Mergens*, 496 U.S. at 253, 110 S.Ct. at 2373 (citing *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 305-06, 105 S.Ct. 1953, 1963-64 (1985)).

The Fifth Circuit would also require school officials step in when students engage in religious speech and "stop the prayers." This myopic view of the First Amendment treats

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10. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100 (1987).

religious speech as a First Amendment orphan.[11] It cannot be reconciled with established First Amendment jurisprudence requiring that above all, the state must be neutral towards religion.[12]

The Court should reject the Fifth Circuit's mistaken conclusion that by speaking at a school-sponsored function a student becomes a state actor for the limited time the student is at the podium. If the Court adopts that reasoning, then any person—student and non-student alike—who speaks at a school event becomes a state actor, potentially exposing the school to liability if he should slip the words "Heavenly Father" into the speech.

And, as a practical matter, how can school districts enforce content-based restrictions on student speech?[13] If school officials do not censor a student's speech beforehand, will

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11. The Court's "precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Pinette*, 515 U.S. at 760, 115 S.Ct. at 2446 (citations omitted).

12. *See infra* Part II.A and note 14.

13. The district court in *Chandler* answered this question by enjoining the students' religious speech and ordering that, should any student violate the injunction, school officials must "take appropriate disciplinary action as they would for any violation of school disciplinary rules, said disciplinary action being calculated to cause the cessation of the violative conduct as it occurs and to deter similar conduct in the future." *Chandler v. James*, 985 F.Supp. 1062, 1064 (M.D. Ala. 1997), *aff'd in part and vacated in part*, 180 F.3d 1254 (CA11 1999), *petition for cert. filed*, 68 U.S.L.W. 3391 (U.S. Dec. 2, 1999) (No. 99-935). Whether the Fifth Circuit endorses this punitive view is unclear, but it at least believes that school officials must step in and "stop the prayers." *Santa Fe I.S.D.*, 168 F.3d at 823.

they then have to decide whether to pull the plug on the microphone or use the proverbial cane to pull the offending speaker from the stage? What if a non-student, keynote speaker at the school's annual sports award banquet, without warning school administrators, passionately advocates that Jesus Christ take the central role in a person's life? Will this violate the Establishment Clause? With this specter in mind, must school officials review every speaker's remarks for religious content and state censure? Or are officials only required to review student messages?

Not only would such a requirement force school officials to coerce and control the speaker's speech, but it would place an incredible burden on state institutions and officials who know too well that an out-of-place phrase with controversial content could result in litigation. Rather than face this risk, many schools may prohibit all student speech having the potential for religious content. This result, however, is no less constitutionally infirm.

Instead of allowing this uncertainty to squelch student expression, the Court should create a bright-line rule to guide schools in crafting their student speech policies. A workable, constitutional standard would recognize that when a school has created a limited public forum in which students or other speakers may speak without official oversight of the content of the speech, there is no state action that would violate the Establishment Clause.

Applying this standard to Santa Fe's current policy, there is simply no state actor that could be the source of state action, coercion, or control, and the Constitution is satisfied.

II. The Santa Fe Football Policy Furthers Government Neutrality Towards Religion.

A. The Policy Is Facially Neutral.

The Court has consistently instructed that the state must be neutral toward religion, neither advancing nor inhibiting it.[14] The Santa Fe football policy unquestionably allows the neutral accommodation of speech and avoids the pitfalls that have invalidated other policies. *See* Pet'r's Br. on Merits. The policy does not allow school officials to review a student's potentially religious message, which would result in impermissible censorship and excessive entanglement. *See Lemon v. Kurtzman*, 403 U.S. 602, 619-20, 91 S.Ct. 2105, 2114-15 (1971); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 844-45, 115 S.Ct. 2510, 2524 (1995). Nor does it allow officials to write or sponsor prayers, which would unquestionably violate the Establishment Clause. *See Engel v. Vitale*, 370 U.S. 421, 425-34, 82 S.Ct. 1261, 1264-68 (1962). In fact, the policy does not require a prayer or other religious speech at all, but simply allows students to decide whether to give a message or invocation, if any, prior to home football games. The content of any message is entirely up to the student selected.

If Santa Fe's facially neutral policy fails to pass constitutional muster, it is difficult to imagine a policy that

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14. *See, e.g., Everson v. Board of Educ.*, 330 U.S. 1, 18, 67 S.Ct. 504, 513 (1947); *Zorach v. Clauson*, 343 U.S. 306, 314, 72 S.Ct. 679, 684 (1952); *Engel v. Vitale*, 370 U.S. 421, 443, 82 S.Ct. 1261, 1273 (1962) (Douglas, J., concurring); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 226, 83 S.Ct. 1560, 1574 (1963); *Lee*, 505 U.S. at 599, 112 S.Ct. at 2661-62 (Blackmun, J., concurring).

would. How can schools ever allow students to take up a microphone if there is some possibility that they might engage in religious speech? Here, students, not school officials, decide whether to give a message at all, and what, if anything, to say. Even if the policy only allowed students to give a "message" prior to school football games, its very neutrality would give students the flexibility to give a prayer. By neutrally accommodating both religious and nonreligious speech, the Santa Fe policy satisfies both the Establishment and Free Speech Clauses.

B. The Policy Has Valid Secular Purposes.

The Fifth Circuit also improperly narrowed the field of valid secular purposes that can underlie a student-message policy, by reaching the remarkable conclusion that solemnization is the only appropriate secular purpose for a student-message policy. *Santa Fe I.S.D.* 168 F.3d at 823. Because football games are "hardly the sober type of annual event that can be appropriately solemnized with prayer," the court came to the conclusion that student-given invocations are never permissible. *Id.* This needlessly limits the category of acceptable secular purposes that can support policies like Santa Fe's. It also underscores the majority's fundamental misunderstanding of the Court's First Amendment jurisprudence. The proper inquiry does not look to the content of the speech, but rather determines whether officials neutrally accommodate all speech in a nondiscriminatory fashion. By permitting, but not requiring, a student-given message or invocation, the Santa Fe football policy does just that.

Despite the Fifth Circuit's holding to the contrary, Santa Fe's football policy is supported by several valid secular purposes. *See Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105 (1971). Indeed, the primary reason Santa Fe created its football policy is because the district court ordered Santa Fe to put the policy in place.[15] *See* JA 31-32, JA 42; 168 F.3d at 812. Taking an action in compliance with a court order is certainly a secular motive. Similarly, creating a neutral student-message policy in an attempt to avoid litigation from both proponents and opponents of school prayer serves a wholly secular purpose.[16]

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15. In fact, the policy put in place by the Santa Fe school board was broader and more neutral than that ordered by the judge. He required a "Clear Creek-type" prayer policy, *i.e.*, a nonsectarian and nonproselytizing prayer, *see Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (CA5 1992), but Santa Fe's policy actually provides for either a neutral student message or a prayer.

16. An issue that may arise in future cases but did not occur here, is: if there is evidence that a student-message policy has a secondary religious purpose or has some supporters with religious goals, will this undermine any sincere secular purpose articulated by the school? The Court has answered this question in its prior jurisprudence, and it is clear that policies motivated only in part by religious intent do not violate the Constitution. A statute will violate the Establishment Clause only if it is "*entirely* motivated by a purpose to advance religion." *Wallace v. Jaffree*, 472 U.S. 38, 56, 105 S.Ct. 2479, 2489 (1985); *see also Adler v. Duval County Sch. Bd.*, 174 F.3d 1236, 1265-66 (CA11) (Marcus, J., dissenting), *reh'g en banc granted and opinion vacated*, 1999 WL 354889 (CA11 June 3, 1999).

Because this issue could arise in future cases, the Court should reiterate the principle that if a student-message policy in another case has some secondary religious underpinnings, this neither erases the valid secular purposes the policy may serve nor results in the promotion of religion. *Chandler*, 180 F.3d at 1262-63. *Lemon* does not require "that the law's purpose must be unrelated to religion—that would amount to a requirement 'that the government show a callous indifference to religious groups,' and the Establishment Clause has never been so interpreted." *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335, 107 S.Ct. 2862, 2868 (1987) (quoting *Zorach v. Clauson*, 343 U.S. 306, 314, 72 S.Ct. 679, 684 (1952)). Instead, "*Lemon's* 'purpose' requirement aims at preventing the relevant governmental decisionmaker . . . from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." *Id.*

Allowing students to have a message or invocation prior to school football games also promotes good sportsmanship and honest and fair play in an otherwise rough and dangerous sport, and encourages teamwork and individual excellence.[17] In addition to sportsmanship, a state's neutral intent to prevent discrimination against religious speech and allow free speech regardless of viewpoint is a valid secular purpose under *Lemon*.[18] *See Americans United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1543 (CA6 1992) (a "policy of treating religious speech the same as all other speech certainly serves a secular purpose.").

Instead of addressing these valid secular purposes, the Fifth Circuit came to the remarkable conclusion that solemnization is the only appropriate secular purpose for a student-message policy. *Santa Fe I.S.D.* 168 F.3d at 823. The Fifth Circuit erred, and the Court should hold the policy is constitutional.

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17. *See Santa Fe I.S.D.*, 168 F.3d at 835 (Jolly, J., dissenting).

18. *See Board of Educ. v. Mergens*, 496 U.S. 226, 248, 110 S.Ct. 2356, 2371 (1990) (plurality) (citing *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335-36, 107 S.Ct. 2862, 2868-69 (1987); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 773, 93 S.Ct. 2955, 2965 (1973)); *Americans United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1543 (CA6 1992).

III. THE COURT SHOULD ADDRESS THE FIFTH CIRCUIT'S PROHIBITION ON ALL BUT NONSECTARIAN, NONPROSELYTIZING STUDENT SPEECH.

Had the Fifth Circuit upheld Santa Fe's football policy, it nevertheless would have imposed an unconstitutional condition on speech occurring under that policy because, in the Fifth Circuit, student religious speech given at school-sponsored events must be both "nonsectarian" and "nonproselytizing." Relying on its opinion in *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (CA5 1992), the Fifth Circuit held that the graduation policy must have that limitation, and assumed that the football policy must necessarily have the same requirement.

The court framed the issue as "whether the pure Clear Creek Prayer Policy embodied in the alternative fall-back provision of the policy can be extended to football games." *Santa Fe I.S.D.*, 168 F.3d at 822. The "pure" Clear Creek policy, which the court adopted for the graduation policy, allows only nonsectarian, nonproselytizing prayers. *Id.* The Court should address this content-based requirement because even if it should reverse the Fifth Circuit's complete proscription of student religious speech at school football games, the circuit's prohibition on all but nonsectarian, nonproselytizing student prayer will still stand. Although the Court did not grant the writ to address the graduation policy, the Fifth Circuit's nonsectarian, nonproselytizing content requirement is before the Court because the Fifth Circuit assumed that it would also apply to the football policy.

Like its complete prohibition on any religious speech at football games, the circuit's nonsectarian, nonproselytizing

requirement would force school officials to discriminate based on religious viewpoint and the content of student speech.[19] Yet the Court has "not excluded from free-speech protections religious proselytizing." *Capitol Square Rev. Bd. v. Pinette*, 515 U.S. 753, 760, 115 S.Ct. 2440, 2446 (1995) (citing *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647, 101 S.Ct. 2559, 2563 (1981)). The Court has been abundantly clear that "state regulation of speech should be content-neutral." *Widmar v. Vincent*, 454 U.S. 263, 277, 102 S.Ct. 269, 278 (1981). The Fifth Circuit's decision would require just the opposite—content-based state regulation of speech.

Moreover, this content-based requirement would require school officials to engage in viewpoint discrimination, again in violation of the First Amendment. Once one type of religious speech is permitted, the state must neutrally accommodate all religious viewpoints. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394, 113 S. Ct. 2141, 2147 (1993) (quoting *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806, 105 S.Ct. 3439, 3451(1985)); *Widmar*, 454 U.S. at 271-72, 277, 102 S.Ct. at 275-76, 278. But the Fifth Circuit's Clear Creek-

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19. The Fifth Circuit remarkably concedes, in the context of the graduation policy, that "if public forum analysis were applicable, then *Clear Creek*'s proscription of prayer that is sectarian and proselytizing would violate the First Amendment after all, but would do so on grounds we never considered in *Clear Creek II*." *Santa Fe I.S.D.*, 168 F.3d at 821 (citing *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (CA5 1992)). As the Court recognized in *Lamb's Chapel*, even if the religious activity occurs in a nonpublic forum, a school district will violate free speech rights if it discriminates solely on the basis of religious viewpoint. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390-96, 113 S. Ct. 2141, 2146-49 (1993).

type policy permits only one type of religious speech—ecumenical—to the exclusion of all others. This content-based requirement simply cannot be reconciled with the Court's established First Amendment jurisprudence, and the Court should make it clear that it is unconstitutional.

CONCLUSION

For these reasons, *amici* respectfully request that the Court reverse the judgment of the circuit court.

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